BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The United States Circuit Court of Appeals for the Seventh Circuit rendered its opinion in this case on October 28, 1942. The opinion is set forth on pages 117-120 of the Record.

Jurisdiction.

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Seventh Circuit on October 28, 1942. A writ of certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911, c. 231, § 240, 36 Stat. 1157 as amended February 13, 1925, c. 229, § 1, 43 Stat. 938).

Statement of the Case and Questions Presented.

For a statement of the case and of the questions presented, see this petition (pp. 1 to 5).

Specification of Errors.

1. The Circuit Court of Appeals for the Seventh Circuit erred in dismissing the appeals to it from the District Court of the United States for the Northern District of Illinois, Eastern Division, for lack of "appellate jurisdiction" and on the ground such appeals presented "a moot question."

2. The Circuit Court of Appeals for the Seventh Circuit erred in not entertaining said appeals and in not taking jurisdiction thereof.

3. The Circuit Court of Appeals for the Seventh Circuit erred in not deciding said appeals upon their merits.

4. The Circuit Court of Appeals for the Seventh Circuit erred in not reversing the order vacating the restraining order entered by Judge Sullivan in the trial court on April 1, 1942 and in not continuing the restraining order in full force and effect and in denying petitioner's motion for a preliminary injunction.

5. The Circuit Court of Appeals for the Seventh Circuit erred in not reversing the order denying petitioner's motion for the entry of an order supplementing the record on appeal pursuant to Rule 75 of the Federal Rules of Civil Procedure entered by Judge Sullivan in the trial court on June 5, 1942.

6. The Circuit Court of Appeals for the Seventh Circuit erred in not holding that defendant's motion to dismiss the original complaint and the amended and supplemental complaint as amended should be denied.

7. The Circuit Court of Appeals for the Seventh Circuit erred in not holding that the original complaint and the amended and supplemental complaint as amended stated a valid cause of action.

ARGUMENT.

I.

The order entered April 1, 1942 in the trial court, vacating the restraining order, is an appealable order.

That the several Circuit Courts of Appeals do have jurisdiction of appeals from orders granting or dissolving restraining orders restraining the transfer of assets, for the recovery of which suit is brought in the District Court, under Section 129 of the Judicial Code, is now too well-settled to require the citation of authority. This Court has many times held that an interlocutory order refusing a restraining order or injunction in the District Court is an appealable order *as of right* under Section 129 of the Judicial Code.

Enelow v. *New York Life Ins. Co.*, 293 U. S. 379;
Shanferoke Coal & Supply Corp. v. *Westchester Service Corp.*, 293 U. S. 449;
General Electric Co. v. *Marvel Metals Co.*, 287 U. S. 430;
Simpson v. *First Nat'l Bk. of Denver*, 129 Fed. 257;
Lockman v. *Lang*, 132 Fed. 1;
McCourt v. *Singers-Bigger*, 150 Fed. 102.

All of the relevant decisions in the Circuit Courts of Appeals are, so far as is known to your petitioner, in accordance with the foregoing decisions in the Supreme Court. Indeed, we do not understand that there is any dispute on this point either in the Circuit Court of Appeals for the Seventh Circuit in this case or on the part of our opponents.

Since petitioner is entitled *as of right* to an appeal under Federal law, the failure of the Circuit Court of Appeals to decide the appeal upon its merits on the ground that it had no "appellate jurisdiction" is clearly erroneous.

II.

When an interlocutory appeal is taken under Section 129 of the Judicial Code the Circuit Courts of Appeals have both the power and the duty to determine whether plaintiff has stated a cause of action in his pleadings in the trial court.

Section 129 of the Judicial Code, granting an appeal as a matter of right from an interlocutory order or decree granting or refusing an injunction in the trial court, was originally enacted in 1891. In 1897 this Court first passed upon the duty of the Circuit Court of Appeals to determine upon such an interlocutory appeal whether plaintiff's bill had stated a valid cause of action.

In *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, defendant took an interlocutory appeal under the statute from an order granting plaintiff an injunction. At the same time defendant also assigned as error the interlocutory decree of the trial court adjudging that plaintiff's patent sued upon was valid and had been infringed. Plaintiff moved the Circuit Court of Appeals for the Ninth Circuit to dismiss the appeal in so far as it involved any question except whether the injunction should have been awarded. The Circuit Court of Appeals denied the motion, reversed the decree of the trial court, and remanded with directions to dismiss the bill. The precise issue presented to this Court was whether, upon appeal from interlocutory orders granting a temporary injunction, the Circuit Court of Appeals

can render or direct a final decree on the merits. Mr. Justice Gray in his opinion carefully considered all of the many decisions upon the question in the various Circuit Courts of Appeals and showed that in the majority of those decisions the Circuit Court of Appeals had "generally concurred in taking the broader view of the appeal itself, and of the power of the appellate court" to consider and decide the merits of the case.

After citing the statute, this Court said (p. 525):

> "The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests; but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it.
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> The power of the appellate court over the cause, of which it has acquired jurisdiction by the appeal from the interlocutory decree, is not affected by the authority of the court appealed from, recognized in the last clause of the section, and often exercised by other courts of chancery, to take further proceedings in the cause, unless in its discretion it orders them to be stayed, pending the appeal. *Hovey* v. *McDonald*, 109 U. S. 150, 160, 161; *In re Haberman Co.*, 147 U. S. 525; *Messonnier* v. *Kauman*, 3 Johns. Ch. 66.
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> In each of the cases now before the court, therefore, the Circuit Court of Appeals, upon appeal from the interlocutory decree of the Circuit Court, granting an injunction and ordering an account, had authority to consider and decide the case upon its merits, and thereupon to render or direct a final decree dismissing the bill."

Mast, Foos & Co. v. *Stover Mfg. Co.*, 177 U. S. 485, was another patent case decided in the Circuit Court of Appeals for the Seventh Circuit in 1900. In that case the defendant took an interlocutory appeal from a preliminary injunction before there was any answer or other pleading filed; and the Circuit Court of Appeals on appeal not only reversed the order for the injunction, but dismissed the bill upon the merits. This Court held that where the question involved was one of law and was fully presented to the court, the power of the Circuit Court of Appeals was properly so exercised (p. 494) "to save the parties from further litigation," citing *Smith* v. *Vulcan Iron Works*, 165 U. S. 518.

In *Metropolitan Water Co.* v. *Kaw Valley Drainage District*, 223 U. S. 519, plaintiff filed a bill in aid of a removal proceeding, praying that defendants be enjoined from further prosecuting certain condemnation proceedings under an act alleged to be in violation of the Fourteenth Amendment. Defendant demurred to the bill and after a hearing a temporary injunction was granted restraining defendant from proceeding further to condemn the property of complainant. The Circuit Court of Appeals for the Eighth Circuit held that the statute was valid and that the trial court had no jurisdiction of the controversy. It therefore reversed the order granting the injunction and remanded the cause with directions to proceed in accordance with its opinion, whereupon the trial court dismissed the bill solely on the ground of the want of jurisdiction. This Court held, in an opinion by Mr. Justice Lamar, that (p. 523):

> "It was within the power of the Circuit Court of Appeals to make such an order on an appeal from an interlocutory order. For, while at one time there was some difference in the rulings on that subject, it was finally settled by *Smith* v. *Vulcan Iron Works*, 165 U. S.

518, that on appeal from a mere interlocutory order the Circuit Court of Appeals might direct the bill to be dismissed if it appeared that the complainant was not entitled to maintain its suit. *In re Tampa Suburban R. Co.*, 168 U. S. 583; *Ex parte National Enameling Co.*, 201 U. S. 156, 162; *Bissell Co.* v. *Goshen Co.*, 72 Fed. Rep. 545, 556-560."

In *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275, the Circuit Court of Appeals for the Fourth Circuit reversed an interlocutory injunction and dismissed the bill on the basis of *ex parte* affidavits submitted by defendant in the trial court. This Court sustained the Circuit Court of Appeals in so far as it dissolved the temporary injunction, but reversed the dismissal of the bill upon the ground that it stated a cause of action and therefore could not properly be dismissed upon appeal without a hearing in the trial court upon the merits. This Court was careful to say, however, (pp. 280-1):

> "Where by consent of parties the case has been submitted for a final determination of the merits, or upon the face of the bill there is no ground for equitable relief, the appellate court may finally dispose of the merits upon an appeal from an interlocutory order. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 525; *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 494; *Castner* v. *Coffman*, 178 U. S. 168, 184; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 287; *U. S. Fidelity Co.* v. *Bray*, 225 U. S. 205, 214; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 136. But in this case the application for a temporary injunction was submitted upon affidavits taken *ex parte*, without opportunity for cross examination, and without any consent that the court proceed to final determination of the merits. Hence there was no basis for such a determination on appeal unless it appeared upon the face of the bill that there was no ground for equitable relief."

In *Meccano, Ltd.* v. *Wanamaker,* 253 U. S. 136, the trial court granted a preliminary injunction. Defendant appealed to the Circuit Court of Appeals for the Second Circuit; and during the pendency of this appeal a decision was rendered in the Circuit Court of Appeals for the Sixth Circuit, which plaintiff claimed worked an estoppel in his favor. Plaintiff in the Circuit Court of Appeals for the Second Circuit moved, upon *ex parte* affidavits and upon the decision in the Circuit Court of Appeals for the Sixth Circuit, for a final judgment in his favor on the appeal. This Court, holding that the Circuit Courts of Appeals may dispose of controversies upon their merits upon interlocutory appeals under Section 129 of the Judicial Code, nevertheless ruled that the Circuit Court of Appeals for the Second Circuit was correct in not granting plaintiff's motion and in remanding the cause to the trial court with directions to reverse the order for the preliminary injunction.

In *Deckert* v. *Independence Corp.,* 311 U. S. 282, decided in December, 1940, this Court again held that on an interlocutory appeal under Section 129 of the Judicial Code the Circuit Courts of Appeals may determine whether plaintiff's complaint does or does not state a cause of action. In that case plaintiff moved for an injunction restraining a trustee from transferring trust assets and for general relief. An interlocutory injunction was granted and an appeal taken under Section 129 of the Judicial Code. Upon such appeal the Circuit Court of Appeals for the Third Circuit also passed upon the correctness of the District Court's denial of defendant's motion to dismiss the bill. This Court held on the appeal that the Circuit Court of Appeals was fully justified in passing upon the question of whether the bill stated a cause of action. After

citing *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, and *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449, as authority for the proposition that "by the plain words of Section 129 (of the Judicial Code) the Circuit Court of Appeals was authorized to consider the appeals from the temporary injunction," this Court said (p. 287):

> "However, this power is not limited to mere consideration of, and action upon, the order appealed from. 'If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated.' *Meccano, Ltd.* v. *Wanamaker*, 253 U. S. 136, 141. See also *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275; *Metropolitan Water Co.* v. *Kaw Valley Drainage District*, 223 U. S. 519; *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518. Accordingly, the Circuit Court of Appeals properly examined the interlocutory order denying the motions to dismiss, although generally it could consider such an order only on appeal from a final decision. *Reed* v. *Lehman*, 91 F. 2d 919; *Miller* v. *Pyrites Co.*, 71 F. 2d 804. Compare *Gillespie* v. *Schram*, 108 F. 2d 39; *Rodriguez* v. *Arosemena*, 91 F. 2d 219; *Kneberg* v. *Green Co.*, 89 F. 2d 100; *Satterlee* v. *Harris*, 60 F. 2d 490.
>
> Respondents' motions sought to dismiss the bill because it failed to state any cause of action and because the District Court lacked jurisdiction. We hold that these motions were correctly denied."

The purport of all of the foregoing decisions is, therefore, that the Circuit Courts of Appeals are not limited upon an appeal from an interlocutory injunction to the mere question of whether the injunction order should or should not have been issued or vacated, but have the affirmative duty to determine whether plaintiff's complaint upon which the preliminary injunction has been sought does or does

not state a cause of action. As stated in the foregoing cases, the purpose of making such a decision is "to save the parties from further litigation" in the event that plaintiff's complaint is devoid of equity.

Applying these decisions, therefore, to the case at bar, it is apparent that the Circuit Court of Appeals for the Seventh Circuit in the decision here appealed from has not only misconceived its power and duty to pass upon the propriety of the interlocutory order vacating the restraining order in the District Court, but also has failed to fulfill its definite obligation to determine whether or not plaintiff's complaint does or does not state a valid cause of action.

Petitioner was entitled as of right to the decision of the Circuit Court of Appeals upon the merits of his appeal from the interlocutory order vacating the restraining order in the District Court; and to answer this question the Circuit Court must determine if there is equity in plaintiff's complaints. This right of appeal arose under Section 129 of the Judicial Code and petitioner may not be deprived thereof merely because the Circuit Court of Appeals is unwilling to examine either the original bill of complaint upon which the trial court based its decision or the amended complaint superseding the original complaint which was brought to the Circuit Court of Appeals by a separate appeal.

Plaintiff has not lost his right to appeal because he amended and supplemented his complaint; nor is the trial court prevented from proceeding with the normal disposition of the litigation merely because an interlocutory appeal was taken by plaintiff. It has always been the

law in this Court that an interlocutory appeal leaves the trial court free to continue with the litigation before it, exactly as though no such interlocutory appeal had been taken. *Ex parte National Enameling & Stamping Co.*, 201 U. S. 156. The filing of the amended complaint did not make the questions on appeal "moot". The amended complaint is *identical* with the original complaint except that paragraphs are *added* to the latter. The cause of action is precisely the same in both. Both complaints being before the Circuit Court of Appeals, it could not say that plaintiff's right to an injunction *pendente lite* was moot.

We conclude, therefore, that there is no merit to the ground set forth in the Circuit Court's opinion for its refusal to consider this appeal upon its merits. On the contrary, by the decisions of this Court cited above, the Circuit Court of Appeals should have followed the repeated requests and suggestions in plaintiff's briefs urging it to determine whether plaintiff had set forth a valid cause of action in his original and amended complaints.

III.

Rule 75 (h) does not restrict the right of a litigant to supplement a record on appeal from an interlocutory order with further proceedings in the trial court after the appeal is taken.

It appears to be the meaning of the Circuit Court of Appeals in its opinion that Rule 75 (h) of the new Federal Rules of Civil Procedure does not specifically authorize the transmittal of any matter from the District Court to the Circuit Courts of Appeals transpiring in the District Court *after* the entry of a preliminary order appealed under Section 129 of the Judicial Code.

On this subject we submit that the Circuit Court of Appeals is quite inconsistent in its opinion. On the one hand it says that it cannot examine the *amended* complaint, because the *amended* complaint was filed *subsequent* to the entry of the interlocutory order appealed from; yet at the same time it says that it can examine a motion to dismiss such interlocutory appeal filed by defendant to determine the fact that the original complaint "had been dismissed by the District Court with leave to file an amended bill of complaint within ten days if appellant so desired." A certified copy of this order was filed by defendant in support of this motion (R. 103). Petitioner filed an answer to this motion, setting forth a copy of his *amended* complaint (R. 105-8). Thus the Circuit Court of Appeals had plaintiff's *amended* complaint before it, not only as a part of the appeal in Cause 8058, but also by virtue of defendant's motion to dismiss the appeal in Cause No. 8001 and petitioner's answer thereto.

We say it is inconsistent for the Circuit Court of Appeals to state that it may examine the supplemental proceedings and pleadings in the District Court *subsequent* to the entry of the interlocutory order appealed from but *only* for the purpose of discovering that the original complaint has been amended and without any opportunity or obligation to determine whether the original or the amended complaint states a valid cause of action. Our point here is that Rule 75 (h), even if it does not *specifically authorize* the inclusion of supplementary orders and pleadings in the District Court after the entry of the interlocutory order appealed from, clearly does not *prevent* the appeals court from ascertaining the existence and contents thereof. It has always been the law that this Court and the several Circuit Courts of Appeals may acquaint themselves with all matters of record in the courts of inferior

jurisdiction, whether or not the same have transpired prior *or subsequent* to the entry of the order or orders appealed from. *Camp* v. *Gress*, 250 U. S. 308, 318; *Patterson* v. *Alabama*, 294 U. S. 600, 607.

Surely, for the Circuit Court of Appeals in this case to say that it *cannot* examine the contents of petitioner's amended complaint brought to it as a part of the consolidated record in Cause No. 8058, and yet at the same time *can* examine the very same amended complaint embodied in an answer filed by petitioner to defendant's motion in the original appeal, Cause No. 8001, is to take a position of deliberate ignorance which it was the very intention of Rule 75 (h) to avoid.

IV.

Ancillary administrations which are useless and expensive should be avoided.

It is submitted that both plaintiff's original and amended complaints state a valid cause of action.

It is beyond doubt and dispute that petitioner, as ancillary administrator in Illinois, may recover and administer any assets belonging to the decedent which are recoverable by action in Illinois.

This Court has held in *New England Life Ins. Co.* v. *Woodward*, 111 U. S. 138, and *Equitable Life Assur. Soc.* v. *Brown*, 187 U. S. 308, that a suit may be brought by a decedent's administrator to recover money belonging to the decedent against a non-resident debtor temporarily within the State, or a corporation doing business there, regardless of where such corporation may have been incorporated or where its principal office may be. This has been the rule also in the several States.

Fox v. *Carr*, 16 Hun. (N. Y.) 434;

Equitable Life Assur. Soc. v. *Vogel,* 76 Ala. 441;
Saunders v. *Weston,* 74 Me. 85;
Knight v. *Hudson Bay Co.,* 6 N. F. 164; and
Williams v. *Williams,* 79 N. C. 417.

It is also the rule in the lower Federal Courts:
Smith v. *New York Life Ins. Co.,* 57 Fed. 133; 67 Fed. 694;
London, Paris & American Bank v. *Aronstein,* 117 Fed. 601.

The foregoing rule is based upon the well-known principle that in an action *in personam* a defendant may be required to pay any money or take any action regarding real or personal property, even though the carrying out of such an action would involve doing an act or affecting a thing in a foreign state. See Restatement of the Law of Conflict of Laws, Sec. 97, p. 147. We cite the Illinois and Federal cases:

(a) Illinois cases so holding:
Carter v. *Carter,* 283 Ill. 324;
Poole v. *Koons,* 252 Ill. 49;
Bevans v. *Murray,* 251 Ill. 603;
White Star Mining Co. v. *Hultberg,* 220 Ill. 578;
Sercomb v. *Catlin,* 128 Ill. 556.

(b) Federal cases so holding:
Clark v. *Iowa Fruit Co.,* 185 Fed. 604;
Byrne v. *Jones,* 159 Fed. 321.

On the foregoing authority there is no lack of power or jurisdiction in the District Court of the United States for the Northern District of Illinois, Eastern Division, to enter an order or decree *in personam* requiring defendant to turn over to plaintiff the property belonging to the de-

cedent, even though defendant is a corporation incorporated elsewhere than in Illinois.

Defendant has, however, urged repeatedly in the courts below that it is exercising physical possession of the securities involved herein within the State of New York and has contended that only in New York may these assets be properly administered. We are therefore at pains to show that there is no foundation for this contention.

It has always been the law that *no ancillary administration is proper* in the absence of local creditors.

In Re Washburn's Estate, 47 N. W. 790 (Minn.);
Caruso v. *Caruso* (N. J.), 148 Atl. 882;
In Re Eaton's Will (Wis.), 202 N. W. 309;
Martin v. *Central Trust Co.,* 327 Ill. 622;
In Re Meyer's Estate, 211 N. Y. Supp. 525; affirmed 244 N. Y. 598.

Moreover under the law of New York an ancillary administrator has no power to distribute the decedent's assets to his heirs or distributees unless all of the heirs or distributees reside in New York.

Matter of Hughes, 95 N. Y. 55;
Lecouturier v. *Ickelheimer,* 205 Fed. 682.

It is affirmatively alleged in both petitioner's original and amended complaint that there are no local creditors in New York of this decedent (R. 5, 75, 79); and it is alleged in the amended complaint that there is no power in the New York Surrogate's Court to distribute the decedent's assets to his heirs or distributees since they are not all residents of New York (R. 78-9). It follows accordingly that an ancillary administration in New York of these assets would be utterly useless, and as alleged in both the

complaints, would be extremely expensive (R. 6, 76, 79). The highest court of New York has decided in the case of *In re Martin's Will,* 255 N. Y. 359; 174 N. E. 753, in a decision by Judge Cardozo, that the costs and expenses of a useless ancillary administration are ample ground for refusal to permit such an administration.

V.

This Court has power and should decide this appeal upon the merits.

It is perhaps unnecessary to cite authority showing that this Court has ample jurisdiction to dispose of this case upon its merits. Under Section 240 of the Judicial Code, in cases coming from Federal Courts the Supreme Court is given full power to enter such judgment or order as the nature of the case requires. Under Section 269 of the Judicial Code the duty is especially enjoined of giving judgment "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

This is the clear holding in such cases as *Camp* v. *Gress,* 250 U. S. 308, and *Patterson* v. *Alabama,* 294 U. S. 600. It is also clearly shown by the cases set forth in Part II of this Argument.

In the case of *Camp* v. *Gress,* 250 U. S. 308, this Court said (p. 318):

> "In cases coming from federal courts the Supreme Court is given by statute full power to enter such judgment or order as the nature of the appeal or writ of error (or certiorari, § 240 of the Judicial Code) requires. Revised Statutes, § 701. Circuit Court of Appeals Act of March 3, 1891, c. 517, § 11, 26 Stat.

826, 829. See also § 10 of the same act. Compare *Ballew* v. *United States,* 160 U. S. 187, 198, *et seq.* And by Act of February 26, 1919, c. 48, 40 Stat. 1181, amending § 269 of the Judicial Code, the duty is especially enjoined of giving judgment in appellate proceedings 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' "

And in *Patterson* v. *Alabama,* 294 U. S. 600, this Court said (p. 607):

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case. *Gulf, C. & S. F. Ry. Co.* v. *Dennis,* 224 U. S. 503, 507; *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9, 21; *Dorchy* v. *Kansas,* 264 U. S. 286, 289; *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Comm'n,* 273 U. S. 126, 131."

It is particularly appropriate that this Court exercise its power to dispose of the entire merits of this controversy. Where the appeal is from an interlocutory order in the trial court, Section 129 of the Judicial Code specifically provides that interlocutory appeals shall take precedence over all other appeals to the end that such appeals

should be decided as promptly as possible. And as this Court said in *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, the appeals court should act upon the merits of the controversy "to save the parties from further litigation" whenever the question is raised as to whether there is equity in the plaintiff's complaint.

It is therefore respectfully submitted that this Court should decide in its opinion in this Court that there is equity in plaintiff's complaints at the time a decision is rendered herein.

CONCLUSION.

We conclude therefore:

1. That petitioner has been deprived, by the decision in the Circuit Court of Appeals for the Seventh Circuit, of his right to an adjudication on the merits of his appeal under Section 129 of the Judicial Code.

2. That since both petitioner's original and amended complaints were before the Circuit Court of Appeals for the Seventh Circuit in both causes No. 8001 and 8058, that court not only had the right but also the duty to pass upon the issue as to whether plaintiff had stated a valid cause of action therein.

3. That Rule 75 (h) of the Federal Rules of Civil Procedure in no way precludes petitioner's right to supplement the record on appeal from an interlocutory order by including pleadings or orders entered in the District Court subsequent to the entry of the interlocutory order appealed from.

4. That there is no want of authority in the District Court of the United States for the Northern District of Illinois, Eastern Division, to enter a valid order or decree

requiring defendant to transmit to petitioner the assets belonging to the decedent for whom petitioner is acting as administrator, in view of the fact that petitioner was appointed such administrator within the jurisdiction of and has the right to sue defendant in the District Court.

5. That a useless and expensive ancillary administration in another State which would serve no conceivable purpose and would result in material loss and damage to the decedent's property should be avoided where possible, as in this case, and that the supposed right to any such ancillary administration constitutes no defense to this action.

6. That this Court should dispose of this entire controversy by holding that there is equity in plaintiff's original and amended complaints.

Petitioner therefore prays that the order of the Circuit Court of Appeals for the Seventh Circuit dismissing the appeal for lack of "appellate jurisdiction" on the ground that this appeal "presents a moot question" should be reversed; and that this Court should decide this case upon the merits and should hold that both plaintiff's original and amended complaints state a valid cause of action.

Respectfully submitted,

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